

No. 15-31

**In the
Supreme Court of the United States**

ALFREDO PRIETO,

Petitioner,

v.

HAROLD CLARKE, Director,
A. DAVID ROBINSON, Deputy Director,
and
E. PEARSON, Warden,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICI CURIAE* CORRECTIONS
EXPERTS IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are corrections directors and administrators with first-hand experience supervising solitary confinement units in prisons across the United States. *Amici* respectfully submit this brief in support of Petitioner Alfredo Prieto.

Toni V. Bair is the former Warden of Mecklenburg Correctional Center in Virginia, where she oversaw death row. From 1986 until 1990, she served as the Regional Administrator of Virginia's prisons, supervising the Wardens of the state's seven adult prisons. She also worked as a Unit Manager at Utah State Prison, where she directed the employees responsible for death row. She was also the Assistant Commissioner for the New York City Department of Correction.

F. Warren Benton served as the Director of the Oklahoma Department of Corrections from 1975 until 1979. He is nationally recognized for his work as a corrections consultant and monitor and has held leadership positions in the American Correctional Association ("ACA") and the Association of State Correctional Administrators ("ASCA"). He is currently a professor at the John Jay College of Criminal Justice in New York City.

¹ Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified more than ten days prior to filing and have consented to the filing of this brief.

Robert Brown, Jr. is the former Director of the Michigan Department of Corrections. He worked for the Michigan Department of Corrections for thirty years—as a prison counselor, a parole officer, a Deputy Warden, a Deputy Director, and, most recently, as the prison’s Director. He currently works as a criminal justice consultant and has worked with the prison systems of Connecticut, Illinois, and Pennsylvania. He was also appointed by a federal district court to serve as a Consent Agreement Monitor. He has been active in the ACA, formerly serving as its President and currently as an auditor. He is the recipient of the ACA’s Edward R. Cass Award, which honors corrections’ most dedicated professionals.

Patricia Caruso worked for the Michigan Department of Corrections for twenty-three years. She served as the Department’s Warden for nine years and as its Director for eight years. She is the President of the Association of Women Executives in Corrections. She formerly served as the President of the ASCA, President of the North American Association of Wardens and Superintendents, and Vice President of the ACA. She is currently the lead facilitator for the Warden Peer Interaction Training program at Sam Houston State University and the facilitator of the National Institute of Corrections’ (“NIC”) flagship leadership program.

Kathleen Dennehy worked for the Massachusetts Department of Corrections for over thirty years, serving as Commissioner from 2004 until 2007. She has also worked as an expert and consultant for the NIC.

Brian Fischer has forty-four years of experience in corrections. He served as the Commissioner of the New York State Department of Corrections from 2007 until 2013. Prior to retiring, he consolidated the Division of State Parole and the Department of Corrections into the Department of Corrections and Community Supervision, downsizing the agency by closing certain prisons.

Martin F. Horn served as the Secretary of Corrections of Pennsylvania—a state with one of the nation’s largest death-row populations—from 1995 until 2000. He was also the Commissioner of the New York City Department of Correction and of the New York City Department of Probation for seven years. He is currently the Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice and the Executive Director of the New York State Sentencing Commission.

Justin Jones worked for the Oklahoma Department of Corrections for thirty-six years, serving as its Director for eight years. Before becoming the Director, he worked as a Probation and Parole Officer, the Warden, the Regional Director of Institutions, and the Deputy Director of the Division of Community Corrections. He is currently the Director of the Tulsa County Juvenile Bureau in Oklahoma. He also serves as the Commission Chair for Correctional Accreditation for the ACA.

Walter L. Kautzky has worked in the corrections field for nearly forty years. He is the former Director of the Iowa Department of Corrections and the former Executive Director of the Colorado Department of Corrections. He has also served as the Deputy Secretary, Deputy Director of

Prisons, and a psychologist of the North Carolina Department of Corrections, the Special Master of the Hawaii Department of Corrections, the Deputy Secretary and Director of Prisons for the Washington State Department of Corrections, and a Classification Officer in the Florida Department of Corrections. In the course of his work, he has evaluated and inspected solitary confinement units in fourteen States.

Steve J. Martin is the former General Counsel and Chief of Staff of the Texas prison system. He has worked as a corrections officer on death row, as a probation and parole officer, and as a prosecutor. He is a corrections expert and consultant for the U.S. Department of Justice (“DOJ”) in forty States. He has inspected more than 700 confinement facilities.

Chase Riveland was the Executive Director of the Colorado Department of Corrections for three years and the Secretary of the Washington State Department of Corrections for eleven years. He also worked in the Wisconsin Department of Corrections for nineteen years. His published work includes the DOJ publication, *Supermax Prisons: Overview and General Considerations* (1999).

Howard Skolnick has forty-five years of corrections experience. He was the Chief Executive Officer of the Nevada Department of Corrections from 2007 until 2011. He also served as Assistant Deputy Director for Industrial Programs and as the Warden of the Southern Desert Correctional Center of the Nevada Department of Corrections. He also worked for the Illinois Department of Corrections and served as the Superintendent of Illinois

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Eldon Vail worked in the corrections field for over thirty-five years, serving as Deputy Secretary and Secretary of the Washington State Department of Corrections for ten years. He has served as an expert witness and corrections consultant over thirty times in fifteen different States.

Roger Werholtz served as the Secretary of Corrections of Kansas from 2002 until his retirement in 2010. He also served as the Deputy Secretary of Corrections of Kansas. He has supervised all three divisions of the Kansas Department of Corrections: Community and Field Services, Programs and Staff Development, and Facilities Management. He has community mental health experience and served on the Governor's Mental Health Services Planning Council. He also served as the Midwest Regional Representative on the Executive Committee of the ASCA. He is the recipient of the 2009 Michael Franke Award, given in recognition of outstanding correctional administration.

Dr. Reginald Wilkinson served as the Director and Warden of the Ohio Department of Rehabilitation and Correction for fifteen years. He is the former President of the ACA and the ASCA.

Jeanne Woodford is the former Director of the California Department of Corrections and former Acting Secretary of the California Department of Corrections and Rehabilitation. She served as the Warden of California's San Quentin State Prison, which houses the nation's largest death row, for five years.

**BRIEF OF *AMICI CURIAE* CORRECTIONS
EXPERTS IN SUPPORT OF PETITIONER**

As corrections directors and administrators, *amici* have witnessed first-hand the debilitating effects of solitary confinement. The Fourth Circuit’s divided decision foreclosing a challenge under the Due Process Clause to Virginia’s system of automatic, permanent solitary confinement of its death-sentenced inmates was in error. *Amici* corrections experts submit this brief to underscore the severe physical and mental hardships that death-sentenced inmates must endure as a result of the extreme isolation, the lack of a penological justification for automatic and permanent solitary confinement for all death-sentenced inmates, and the safe, constitutional alternative of individual classification that substantially benefits the corrections system.

“Years on end of near-total isolation exact a terrible price.” *Davis v. Ayala*, 576 U.S. __ (2015) (Kennedy, J., concurring) (slip op. 4). *Amici* corrections experts are well-suited to address the harsh consequences of solitary confinement, including serious physical and mental harms, as to which there is widespread consensus in the scientific community, among professional organizations, and internationally. As leaders in the corrections profession have acknowledged, prolonged solitary confinement creates or exacerbates mental illness. While short-term restrictive housing is sometimes necessary to separate those most violent inmates that pose a risk to themselves or others, solitary confinement is widely overutilized. A number of States are in the process of limiting its use, but some 80,000 inmates across the United States are still

held in various degrees of near-total sensory and human contact deprivation in cells roughly the size of a parking space. In Virginia, death-sentenced inmates are automatically placed in permanent solitary confinement that is fundamentally unlike, and significantly more harsh than, ordinary life for the general prison population.

In *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court held that an inmate possesses a liberty interest protected by the Due Process Clause in avoiding an assignment that “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 223. There is no penological justification for imposing extreme isolation across the board on a population of inmates based only on their sentence because the sentence is not predictive of how an inmate will behave in prison. Inmates who have been sentenced to death are not more violent than other groups of inmates and are actually less violent than certain groups. Solitary confinement of death-sentenced inmates is not necessary for institutional safety or security. Nor do death-sentenced inmates act as if they have nothing to lose. In fact, since 1975, almost twenty percent of Virginia’s death-sentenced inmates have left death row following relief from their death sentence.

Individual classification of death-sentenced inmates is a workable and constitutionally sound alternative to automatic and permanent solitary confinement. That approach would substantially reduce costs and improve inmate management. Virginia already classifies its general population inmates upon entry to determine their conditions of

confinement and reclassifies them annually. Multiple objective factors may be used—age, history of violence and mental illness, gang membership, recent disciplinary actions—to predict effectively whether an inmate will misbehave in prison. The same individualized approach can and should be taken with death-sentenced inmates, as is done successfully in several States. And to the extent there is judicial hesitancy to interfere with prison administration, a recognition of the liberty interest in this context and the resulting due process protection would only enhance the exercise of discretion by corrections officials.

Amici's experience has led them to understand that automatic and permanent placement of death-sentenced inmates in solitary confinement is harmful and unnecessary to institutional safety. *Amici* urge this Court to grant certiorari to determine whether an inmate possesses a liberty interest protected by the Due Process Clause in avoiding automatic and permanent assignment to the extreme conditions of solitary confinement.

REASONS FOR GRANTING THE WRIT

Amici agree with Petitioner that the sharp division of the courts of appeals on the two questions presented in the Petition warrants this Court's review. *Amici* write separately to explain how the automatic and permanent placement of Virginia's death-sentenced inmates in solitary confinement subjects those inmates to atypical and significant hardships in comparison with ordinary incidents of prison life, constituting a deprivation of a liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), and *Wilkinson v. Austin*, 545 U.S. 209 (2005).

The automatic and permanent isolation inflicts gratuitous debilitation without serving any correctional purpose. Death-sentenced inmates can be safely classified following an individualized assessment based on recognized correctional principles, and they can be safely managed without automatic solitary confinement.

I. AUTOMATIC AND PERMANENT SOLITARY CONFINEMENT UNNECESSARILY IMPOSES ATYPICAL AND SEVERE HARDSHIPS

Amici agree that some form of restrictive housing, imposed on an inmate for a limited amount of time following an individualized assessment, is a required tool in the correctional arsenal. But extreme isolation is unduly harsh and unnecessary when it is imposed for a long period of time without any individualized basis.

A. Solitary Confinement Is Fundamentally Unlike Ordinary Prison Life

Conditions on Virginia's death row present an atypical hardship in relation to ordinary incidents of prison life in Virginia. Virginia inmates sentenced to death are automatically and permanently assigned to "hars[h]," "undeniably severe," and "perhaps ... 'dehumanizing'" conditions of confinement. App.17a (quoting App.39a).

For the last seven years, Petitioner has spent 23 hours or more every day alone in a 71-square foot cell, deprived of almost all human contact. See App.30a. Indisputably, those conditions qualify as solitary confinement, which is generally understood

as the practice of placing a person alone in a cell approximately the size of a parking space for 22 to 24 hours a day with little to no human contact, reduced or no natural light, and severe constraints on visitation. See, e.g., *Wilkinson*, 545 U.S. at 214, 223–24; Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 *Crime & Just.* 385, 395 (2001).

Some 80,000 individuals are held in solitary confinement in the United States. See Eva Vazquez, *Solitary Confinement Is Cruel and Ineffective*, *Scientific American* (Jul. 17, 2013). That statistic does not reflect how many of those individuals were confined in such conditions automatically, as a result of their sentence, and permanently, with no regard for changing individualized circumstances.²

This Court has previously recognized that such “harsh conditions” imposed “an atypical and significant hardship within the correctional context,” giving rise to “a liberty interest in avoiding assignment” to the conditions. *Wilkinson*, 545 U.S. at 224. “In some respects, Prieto’s conditions are actually more restrictive than those in *Wilkinson*.” App.22a (Wynn, J., dissenting). And inmates in *Wilkinson* were reviewed for possible transfer to less restrictive conditions at least annually. 545 U.S. at

² The study the Fourth Circuit majority relied upon to conclude that conditions on Virginia’s death row are similar to those in other States, see App.18a n.11, did not draw that distinction. See Mark Cunningham & Mark Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 *Behav. Sci. & L.* 191, 204 (2002).

224. In contrast, Petitioner’s extreme isolation is permanent.

Virginia’s death row inmates are kept in solitary confinement while awaiting execution on average for “seven ... to ten years,” according to Virginia Department of Corrections (“VDOC”) Director Clarke. CAJA679.³ In the United States on average, in 2014, a death row inmate’s execution occurred “nearly 18 years after a court initially pronounced its sentence of death.” *Glossip v. Gross*, 576 U.S. ___ (2015) (Breyer, J., dissenting) (slip op. 18).

To the extent some portion of that delay may be attributed to the inmate’s appeals, there is a starkly clear reason why those appeals are necessary. Since 1975, *twenty-five* of the 149 inmates sentenced to death in Virginia—almost twenty percent—have obtained relief and left death row.⁴

³ CAJA refers to the Joint Appendix produced in the court of appeals.

⁴ Of those inmates, eight received clemency. See <http://leg2.state.va.us/DLS/h&sdocs.nsf/Search+All/?SearchView&SearchOrder=4&query=clemency>. The remaining inmates obtained relief post-conviction or on appeal. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012); *Winston v. Kelly*, 784 F. Supp. 2d 623 (W.D.Va. 2012); *Andrews v. Commonwealth*, 699 S.E.2d 237 (2010); *Burns v. Commonwealth*, 688 S.E.2d 263 (2010); *Morrisette v. Warden of Sussex I State Prison*, 613 S.E.2d 551 (2005); *Thomas v. Commonwealth*, 559 S.E.2d 652 (2002); *Jackson v. Warden of Sussex I State Prison*, 529 S.E.2d 587 (2000); *Lilly v. Commonwealth*, 523 S.E.2d 208 (1999); *Frye v. Commonwealth*, 345 S.E.2d 267 (1986); *Johnson v. Commonwealth*, 273 S.E.2d 784 (1981); *Patterson v. Commonwealth*, 283 S.E.2d 212 (1981); *Martin v. Commonwealth*, 271 S.E.2d 123 (1980).

B. Solitary Confinement Is Uniquely Mentally And Physically Debilitating As Compared To Ordinary Prison Life

There is substantial consensus that solitary confinement causes debilitating mental and physical harms. Because human brains are designed for social interaction, extreme isolation results in neurological changes to the brain, quickly degrading brain function. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. Pol’y 325, 331 (2006). A recent report for the National Aeronautics and Space Administration (“NASA”) recognized that prolonged sensory deprivation and isolation leads to the “development of adverse behavioral conditions and psychiatric disorders.” Edward Vessel & Steven Russo, NASA, *Effects of Reduced Sensory Stimulation and Assessment of Countermeasures for Sensory Stimulation Augmentation* i (2015). Sensory deprivation causes the body to produce increased cortisol, “well-documented to have negative health consequences for both the body and the brain,” negatively affecting cognition, mood, and well-being. *Id.* at i, 20, 23, 28, 51–52, 65–66. Those detrimental effects occur after as little as two days, and the risk increases the longer an individual is subjected to deprivation. *Id.* at 22, 28.

Solitary confinement leads to immediately obvious physical harm, including self-mutilation and suicide. Half of prison suicides occur in solitary confinement. See Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 Correctional Mental Health Rep. 1, 11 (2011). As *amici* have witnessed in their years of

experience, it is not unusual for inmates in solitary confinement to swallow razors, smash their heads into walls, compulsively cut their flesh, and try to hang themselves. See also Thomas Benjamin & Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison*, 9 Clearinghouse Rev. 83, 84 (1975) (one inmate nearly died from loss of blood after cutting himself with his broken light bulb, another swallowed glass, numerous others attempted hanging, several successfully).⁵

This Court recognized more than a century ago that “[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane” *In re Medley*, 134 U.S. 160, 168 (1890). Extreme isolation is also associated with substantial psychological trauma, including anxiety, headaches, troubled sleep, or lethargy, heart palpitations, obsessive ruminations, confusion, irrational anger, withdrawal, violent fantasies, hallucinations, perceptual distortions, emotional flatness, and

⁵ See also John Cacioppo et al., *Social Isolation*, 1231 *Annals N.Y. Acad. Sci.* 17, 17 (2011) (solitary confinement is a “strong ... risk factor for morbidity and mortality”); Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *Am. J. Pub. Health* 442, 445 (2014) (inmates subjected to solitary confinement are over six times more likely to attempt or commit suicide); Jeffrey Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 *J. Am. Acad. Psychiatry & L.* 104, 104 (2010) (solitary confinement “can be as clinically distressing as physical torture”).

depression. See Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 130–31 (2003). The research is “strikingly consistent.” Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *Am. J. Psychiatry* 1450, 1450–54 (1983). A recent survey of both modern prisoner studies and studies of extreme isolation in other contexts found wide-ranging consensus on “deterioration in the ability to think and reason, perceptual distortions, gross disturbances in feeling states, and vivid imagery in the form of hallucinations and delusions.” Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 *Indiana L.J.* 741, 756 (2015).

Lasting effects of solitary confinement, which continue after release, include “persistent symptoms of post traumatic stress (such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness).” Grassian, *Psychiatric Effects of Solitary Confinement*, *supra*, at 353. Indeed, Senator John McCain, a former prisoner of war, described solitary confinement as “an awful thing” that “crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.” Atul Gawande, *Hellhole*, *New Yorker*, Mar. 30, 2009, at 38 (quoting Sen. McCain’s remarks).

Without individualized assessment, there is no opportunity to identify individuals with preexisting mental illnesses that may be exacerbated by solitary confinement. See *infra* n.6. But deleterious effects are not limited to inmates with preexisting mental health issues. See Grassian, *Psychiatric Effects of*

Solitary Confinement, supra, at 333 (“[F]or many of the inmates so housed, incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”).

The co-chairs of a recently formed committee of the ACA—the oldest association of corrections practitioners—acknowledged that prolonged solitary confinement conditions “manufacture or increase mental illness.” Gary Mohr & Rick Raemisch, *Restrictive Housing: Taking the Lead*, Corrections Today (March 2015). Petitioner’s own Warden—a Respondent in this case—agreed that “we—as humans, we don’t survive very well that way with lack of human contact.” CAJA282.

Associations of mental health professionals, including the American Psychiatric Association, the American Public Health Association, the National Alliance on Mental Illness, and the Society of Correctional Physicians, have issued policy statements opposing long-term solitary confinement, especially for inmates with mental illness.⁶ The American Bar Association recommends that solitary confinement be utilized only as needed for disciplinary or security reasons following adequate process and advocates against solitary confinement

⁶ See Am. Psych. Ass’n, Position Statement on Segregation of Prisoners with Mental Illness (2012); Am. Pub. Health Ass’n, Solitary Confinement as a Public Health Issue, Policy No. 2013-10 (2013); Nat’l Alliance On Mental Illness, Public Policy Platform, Section 9.8 (2014); Soc’y Of Correctional Physicians, Position Statement on Restricted Housing of Mentally Ill Inmates (2013).

for death-sentenced inmates. See Am. Bar Ass'n, *Criminal Justice Standards on the Treatment of Prisoners* 23-2.6(a), 23-2.9 (2010). The ACA also counsels that solitary confinement be used only when no alternative is available and has called for individualized assessments of inmates before placement. See Am. Correctional Ass'n, *Resolution on the Use of Restrictive Housing*, Corrections Today (Nov. 2013). And the legislative⁷ and executive⁸ branches have increasingly reassessed extreme isolation in prisons.

Solitary confinement practices have been condemned by the United Nations Special Rapporteur on Torture. See Amnesty International, *Entombed: Isolation in the U.S. Federal Prison System* 35–36 (2014). The United States “stands virtually alone” in incarcerating thousands in solitary confinement. *Id.* at 2.

“[V]ery few ... are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts

⁷ Two U.S. congressional hearings have been held on the issue. See Solitary Watch, *Testimony* <http://solitarywatch.com/resources/testimony> (last visited Aug. 6, 2015).

⁸ See, e.g., Peter Baker & Erica Goode, *Critics of Solitary Confinement Are Buoyed as Obama Embraces Their Cause*, N.Y. Times, July 21, 2015. A recent study also recommended that the Federal Bureau of Prisons further individualize referrals to restrictive housing and reduce that population. See CNA, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment* (Dec. 2014).

upon the sufferers.”⁹ Overlooking the uniquely debilitating harms imposed by long-term solitary confinement because those inmates are out of sight or because any such harms are just desserts substantially impairs that “essence of human dignity inherent in all persons,” which “[p]risoners retain.” *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

II. THERE IS NO PENOLOGICAL JUSTIFICATION FOR AUTOMATIC AND PERMANENT CONFINEMENT OF DEATH-SENTENCED INMATES IN EXTREME ISOLATION

There is no rational reason for automatically keeping any inmates, including those sentenced to death, in permanent solitary confinement as a result of their sentence. As the co-chairs of the ACA committee on solitary confinement acknowledged, while there is a need for short-term solitary confinement of the “most violent inmates” to protect themselves and others, solitary confinement is now widely overused. See Mohr & Raemisch, *supra* (“It’s difficult for those of us in corrections to believe we have allowed an outdated process that, for the most part, has not worked to continue for so long.”); see also Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. Times, Aug. 3, 2015 (“Prison consultants ... have often found that only a small minority [of those so housed] require ... restricted confinement.”).

⁹ Charles Dickens, *American Notes For General Circulation* 146–47 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842) (note following an 1842 visit to the Cherry Hill prison, which was experimenting with extreme isolation techniques).

In recognition of the limited function that solitary confinement must serve, several States have or are in the process of narrowly tailoring their use of the punishment and adding greater procedural protections. See Am. Civil Liberties Union, *State Reforms to Limit the Use of Solitary Confinement* (2013) (describing reforms in Colorado, Illinois, New Mexico, Mississippi, Maine, Michigan, and Texas). In certain respects, Virginia has taken initial steps to join this national trend, at least as to non-death-sentenced inmates. Facing mounting public scrutiny,¹⁰ VDOC reduced the number of high-security inmates in solitary confinement at one prison by more than 50% between 2011 and 2013.¹¹

No safety or security rationale supports subjecting all death-sentenced inmates to automatic and permanent solitary confinement. Capital inmates do not require such confinement as a matter of security. Death-sentenced inmates “typically do not perpetrate violence in prison.” Mark Cunningham & Mark Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 *Behav. Sci. L.* 191, 203 (2002). They are not more violent than other groups of inmates, and are actually less violent than some subsets of the prison population. See Mark Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates*

¹⁰ See, e.g., Adam Ebbin et al., *Why All Virginians Should Care About Overuse of Solitary Confinement*, *Wash. Post*, Jan. 20, 2012.

¹¹ Incidents and grievances have declined as a result. See Patrick Hope & Adam Ebbin, *Virginia Turns Away from Solitary Confinement*, *Wash. Post*, Sept. 6, 2013.

in Missouri, 23 Behav. Sci. L. 307, 316–19 (2005). An analysis of more than ten years of data from Missouri, where death-sentenced inmates may be integrated into the general population on the basis of an individualized assessment, shows that death-sentenced inmates committed acts of in-prison violence at rates equivalent to inmates sentenced to life without parole. See *ibid.* Other studies have confirmed that individuals convicted of murder are not more violent in prison than people convicted of other crimes. See Jon Sorensen & Mark Cunningham, *Conviction Offense and Prison Violence: A Comparative Study of Murderers and Other Offenders*, 56 Crime & Delinq. 103, 114 (2008). And death-sentenced inmates were significantly *less* violent in prison than parole-eligible inmates. See *id.* at 106.

Nor do death-sentenced inmates behave as if they have nothing to lose. Rather, one study found that inmates who were sentenced to death were motivated to make the most of their time, responding well to incentive programs and work opportunities. See Cunningham et al., *Is Death Row Obsolete?*, *supra*, at 319; see also CAJA655–66 (Director Clarke agreeing that death-sentenced inmates do not act as if they have nothing to lose). In fact, death-sentenced inmates have much to lose. Inmates pursue appeals and post-conviction relief and request clemency, see *supra* 11, and, not infrequently, are granted relief to leave death row.

III. INDIVIDUAL ASSESSMENT IS A CONSTITUTIONAL AND WORKABLE ALTERNATIVE TO AUTOMATIC AND PERMANENT SOLITARY CONFINEMENT OF DEATH-SENTENCED INMATES

The extreme isolation of solitary confinement should not be imposed without some individual assessment of the need and basis for placement and a recurring reevaluation thereof. The conditions of confinement of death-sentenced inmates may be appropriately determined on an individual basis, just like for inmates in the general population.

A. Individual Classification To Determine The Appropriate Conditions Of Confinement And Incentive-Based Management Programs Are Best Practices In The Corrections Profession

It is a best practice in the corrections profession to classify individual inmates objectively in order to determine conditions of confinement and to reevaluate those classifications over time. Multiple factors may be used, including age, history of violence and mental illness, gang membership, and recent disciplinary actions. See James Austin, Nat'l Inst. of Corrections, Findings in Prison Classification and Risk Assessment 4–5 (2003). Those factors effectively predict whether an inmate will misbehave in prison. *Ibid.* Conversely, considering only a inmate's sentence has “little if any predictive capabilit[y].” *Id.* at 5.¹²

¹² See also James Austin & Kenneth McGinnis, Nat'l Inst. of Corrections, Classification of High-Risk and Special

Prison officials may use this risk assessment to determine appropriate conditions of confinement, which may be updated on reclassification. See Virginia Hutchinson et al., Nat'l Inst. of Corrections, *Inmate Behavior Management: The Key to a Safe and Secure Jail* 5 (2009). DOJ's NIC maintains that individualized, risk-based classification is an "essential element" of a safe and secure facility. *Id.* at 2–6.

Incentive-based management is another best practice and an "essential element" of a safe and secure facility. *Id.* at 2, 9–10. It motivates inmates to behave well by rewarding good behavior and, conversely, penalizing poor behavior. *Ibid.*

VDOC already utilizes both of those best practices for its general population. Non-capital inmates at VDOC are initially classified into a risk-level category based on a combination of eight factors, including history of institutional violence and escape, length of remaining time to serve, and severity of the offense. See CAJA244, 825. They are assigned to confinement conditions based on their risk level, may be reassessed at any time, and receive annual reviews that place more weight on conduct in prison. See CAJA247, 776, 826. The purpose is to "enhanc[e] ... safety by ensuring that each offender receives the appropriate level of control and management while reducing the operating cost of the DOC by ensuring that offenders are not subjected to excessive control

Management Prisoners (2004); David Simourd, *Use of Dynamic Risk/Need Assessment Instruments Among Long-Term Incarcerated Offenders*, 31 *Crim. Just. & Behav.* 306, 319 (2004).

and management.” CAJA218. Even those convicted of multiple counts of capital murder (but not sentenced to death) are reclassified to less-restrictive conditions when well behaved. See Pet. 6. VDOC also employs incentive-based management for non-capital inmates, requiring good behavior for inmates to maintain less restrictive settings. See CAJA826.

B. Individual Classification And Incentive-Based Management Can And Should Be Applied To Death-Sentenced Inmates

Applying individualized classification procedures and incentive-based management to death-sentenced inmates gives those inmates an additional impetus for good behavior. VDOC can and should safely and effectively use those systems to manage capital inmates. Nothing about death-sentenced inmates makes those widely accepted best practices inapplicable to them. Respondent Warden Davis himself acknowledged that some of VDOC’s death-sentenced inmates could “handle a situation that was less restrictive and not be a security threat.” CAJA286. VDOC’s Director of Offender Management Services likewise admitted that death-sentenced inmates “very well could” be motivated by positive-behavior incentives. CAJA755. And VDOC houses other high-security inmates in the general population. See *supra* 18.

Experiences in other States confirm that VDOC can safely and effectively use individualized classification and incentive-based management for its death-sentenced inmates. Several States have successfully mainstreamed death-sentenced inmates or eliminated automatic solitary confinement,

including correctional facilities in Missouri, California, North Carolina, Colorado, and Pennsylvania.¹³

Missouri, for example, has classified death-sentenced inmates under the same system as all other inmates since 1991. Death-sentenced inmates in Missouri are eligible for multiple incentive programs and many are mainstreamed into the general population. See Cunningham et al., *Is Death Row Obsolete?*, *supra*, at 307, 312. This system was immediately successful: between 1991 and 2002, no death-sentenced inmates committed or attempted any homicides, and those inmates had institutional violence rates similar or well below those of other inmates. See *id.* at 313–14. Missouri’s experience is highly replicable, as its capital inmate population and its prisons’ architecture and security procedures are comparable to those of other States. See Andrea Lyon & Mark Cunningham, “Reason Not the Need”: *Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?*, 33 Am. J. Crim. L. 1, 7 (2005).

Individualized classification of death-sentenced inmates carries significant benefits for the

¹³ Texas also successfully eliminated automatic solitary confinement for all death-sentenced inmates from 1985 until the late-1990s. See Cunningham & Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement*, *supra*, at 205; James Marquart et al., *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923–1990* 140–41 (1994). After 1999, however, all death-sentenced inmates in Texas have been subject to indefinite solitary confinement. See Steve Martin, *Texas Should End Solitary Confinement on Death Row*, *Houston Chron.*, Feb. 8, 2014.

corrections system, most acutely in minimizing costs and management. Solitary confinement is substantially more expensive to administer than general population units. See Cunningham et al., *Is Death Row Obsolete?*, *supra*, at 317. Texas illustrates the point. In 2002, the average cost to confine an inmate in solitary confinement was 50% more than in the general population, amounting to at least an additional \$7,000 per death-sentenced inmate per year. See *ibid.* Given that death-sentenced inmates typically spend years, if not decades, on death row, see *supra* 11, automatic solitary confinement significantly increases correctional budgets. Also, in *amici's* experience, inmates in solitary confinement have great difficulty adjusting to extreme isolation. They are often difficult to manage, requiring increased medical and psychological care, and they have greater instances of misconduct. Individually classified inmates would adjust better to detention, reducing inmate management issues.

To the extent there is concern about interference with official discretion, moreover, that discretion would only be increased as a result of individual classification. Discretion is effectively absent when death-sentenced inmates are automatically and permanently placed in solitary confinement.¹⁴ With solitary confinement mandatory for death-sentenced inmates, the harsh conditions of isolation are imposed without any individualized consideration.

¹⁴ In any event, “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.” *Brown*, 131 S. Ct. at 1928–29.

Prisons, not judges or juries, determine which inmates will face solitary confinement.¹⁵ In addition, whether a defendant faces the death penalty, and thus whether he is subject to solitary confinement, may depend on factors including the defendant's characteristics,¹⁶ the charging prosecutor's views on the death penalty,¹⁷ and geography.¹⁸

“Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference.” *Davis*, 576 U.S. __ (Kennedy, J., concurring) (slip op. 3). Only through considering each inmate individually can prisons provide due process before inflicting the atypical and harsh conditions of solitary confinement. This Court recognized the harsh reality of solitary confinement

¹⁵ *Cf. Davis*, 576 U.S. __ (Kennedy, J., concurring) (slip op. 3) (“[I]t is as if a judge had no choice but to say: ‘In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, ... solitary confinement ... will bring you to the edge of madness, perhaps to madness itself.’”).

¹⁶ See *Glossip*, 576 U.S. __ (Breyer, J., dissenting) (slip op. 13) (“the racial composition of and distribution within a county plays an important role” in whether a defendant receives the death penalty).

¹⁷ See *id.* at 12 (“the power of the local prosecutor” may determine whether a defendant is sentenced to death); Campbell Robertson, *The Prosecutor Who Says Louisiana Should ‘Kill More People’*, N.Y. Times, July 7, 2015.

¹⁸ See *Glossip*, 576 U.S. __ (Breyer, J., dissenting) (slip op. 12) (“[B]etween 2004 and 2009 ... just 29 counties ... accounted for approximately half of all death sentences imposed nationwide.”).

125 years ago,¹⁹ and it should not be imposed without due process now.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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¹⁹ See *Medley*, 134 U.S. at 170.